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No. 84-1101

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAN KING BRAINARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the loss of certain defense exhibits during petitioner's appeal following his first trial required dismissal of the indictment.

2. Whether petitioner's innocent involvement in a prior fraud perpetrated by a co-conspirator was admissible for the purpose of showing petitioner's knowledge and lack of mistake.

3. Whether the district court gave petitioner a more severe sentence than a co-defendant solely because petitioner declined to plead guilty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 745 F.2d 320. An earlier opinion of the court of appeals following petitioner's first trial is reported at 690 F.2d 1117.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1984. A petition for rehearing was denied on November 13, 1984 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on January 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted on 13 counts of mail fraud, in violation of 18 U.S.C. 1341, and was sentenced to a term of five years' imprisonment. The court of appeals reversed and remanded for a new trial. 690 F.2d 1117 (1982). Following a jury retrial, petitioner was convicted on 12 mail fraud counts and was sentenced to four years' imprisonment.[1]

1. The evidence at trial (see Pet. App. 4a-6a; 690 F.2d at 1119-1121) showed that petitioner, co-conspirator Halton Bittick, and later co-conspirator Sheldon Moss, were co-owners of National Executive Planners, Inc. (NEP), a small North Carolina investment company. Before he became an owner of NEP, Moss was involved exclusively with his own business, Television Marketing Corporation (TVM), which supposedly marketed and distributed consumer products to national retail chain stores. Moss represented that TVM was experiencing cash flow problems because the retail stores did not pay for the merchandise until one to three months after they

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[1] At the first trial, petitioner's co-defendant, Halton Q. Bittick, was convicted on 13 mail fraud counts and one count of making a false statement to the Securities and Exchange Commission; his convictions also were reversed on appeal. Prior to the second trial, Bittick pleaded guilty to the securities count pursuant to a plea agreement. He was sentenced to an eight-month term of imprisonment and was fined $5,000. Co-conspirator Sheldon Moss pleaded guilty to all mail fraud charges before the first trial. Charges against a fourth defendant, Sheldon Rothman, were dismissed before the first trial. Pet. App. 2a-4a.

received it. He suggested to petitioner that NEP clients loan money to TVM, with the loans to be secured by assignments of accounts receivable from large retailers and repaid at an above-market interest rate.

Petitioner agreed to Moss's proposal. For several years, petitioner, Bittick, and the NEP staff recommended to approximately 1,000 NEP clients that they invest in TVM. During this period NEP clients invested over four million dollars in TVM. Petitioner told his sales staff how to market the TVM investment to NEP clients; he instructed them to tell investors who questioned the proposed investment that no other information was available and that if they were uncomfortable they could invest their money elsewhere (C.A. App. 1163, 1169). Investors were informed that there was a connection between Sears, Roebuck and TVM (*id.* at 479, 573). NEP was experiencing financial difficulties during this period. The relationship between NEP and TVM led to improvement of petitioner's own financial situation in various respects. 690 F.2d at 1120.

In fact, TVM was a "Ponzi" scheme in which the interest paid to investors was financed through the investments of new victims. TVM had no relationship with Sears, Roebuck, no office, no employees, and no income. The scheme collapsed in 1978. At trial, petitioner did not dispute that the TVM scheme was fraudulent, but claimed merely that he had been duped along with all of the other victims.

2. Following the first trial, the court of appeals reversed the convictions of petitioner and Bittick because of the district court's failure to admit hearsay testimony about statements by Moss that neither petitioner nor Bittick knew about the fraudulent

scheme. 690 F.2d 1117 (1982). Following a remand, petitioner was retried and was again convicted.

The court of appeals affirmed petitioner's convictions (Pet. App. 1a-17a). The court of appeals held that petitioner had waived any objection to loss of certain defense exhibits during his first appeal by failing to make a timely investigation and presentation of his objection to the district court (*id.* at 6a-12a); that evidence concerning an earlier investment petitioner had marketed for Moss was properly admitted (*id.* at 13a-15a); and that there was no basis for petitioner's contention that he was impermissibly punished for electing a retrial because he received a substantially longer sentence than co-defendant Bittick (*id.* at 16a-17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore unwarranted.

1. Petitioner first contends (Pet. 9-19) that the loss of certain defense exhibits during the appeal following his first trial interfered with his right to present evidence on his own behalf. He contends also (*id.* at 19-32) that the court of appeals erred in holding that he had waived his objection to loss of the exhibits.

a. On October 7, 1982, the court of appeals reversed petitioner's convictions following his first trial. On March 29, 1983, the district court clerk notified petitioner's newly-retained counsel and the government that some of petitioner's trial exhibits apparently had been misplaced while the case was

on appeal (C.A. App. 44-45). The notification included a letter from a senior deputy clerk of the court of appeals, stating that petitioner's attorney on the first appeal had told her he had copies of all the defense exhibits (*id.* at 46).[2] In March 1983, petitioner's new counsel received the case files from petitioner's former counsel. Pet. App. 7a. Petitioner's new counsel subsequently retrieved the defense exhibits that had been returned to the custody of the district court. On May 11, 1983, the district court held a hearing on pretrial motions. Petitioner's counsel did not mention the problem of missing exhibits at that hearing. C.A. App. 167.

Petitioner's retrial began on July 6, 1983. Around July 12, petitioner's counsel advised the government that a videotape of three TVM commercials (Def. Exh. 35) was missing (C.A. App. 1620). The parties agreed to stipulate to the existence of the exhibit, that the videotaped commercials were played to petitioner when he first visited TVM's Chicago office, and that the subjects of these commercials were three products that Moss told petitioner were distributed by TVM (*id.* at 1542-1543).

In the second week of trial, after all witnesses for the government and the defense had testified, petitioner moved to dismiss the indictment or for a new trial on the ground that defense exhibits from the first trial were missing (C.A. App. 1501-1515). Petitioner's counsel asserted that he had been unable to raise the matter earlier because he had not discovered until the preceding weekend that the exhibits were

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[2] Petitioner's attorney on the first appeal later denied that he had made such a statement to the deputy clerk (C.A. App. 173A-173C).

unavailable (*id.* at 1504-1506, 1511).[3] Counsel did not identify any of the missing exhibits except the videotaped commercials, which he characterized as the "main" one of the missing exhibits (*id.* at 1513). While the jury was deliberating, petitioner's counsel filed a memorandum listing 42 missing exhibits, including the videotaped commercials, and contending that the unavailability of four exhibits particularly prejudiced petitioner (*id.* at 154-157).

On the date set for petitioner's sentencing hearing petitioner again raised the matter of the missing exhibits. Petitioner itemized 13 unavailable exhibits that he alleged were important to his defense (C.A. App. 1573), but acknowledged that many of these exhibits were not essential (*id.* at 1615). The government argued that petitioner had not made an adequate attempt to locate the missing exhibits and had failed to show that he was harmed by the unavailability of the exhibits (*id.* at 1620-1622).

Following a hearing, the district court concluded that petitioner had failed to raise the problem of the missing exhibits in a timely manner and denied petitioner's motion to dismiss the indictment (C.A. App. 1678-1680). The court noted that petitioner failed to notify the court in advance of trial that the exhibits were missing, did not request a continuance

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[3] Petitioner now asserts (Pet. 24) that his counsel discovered on the second day of trial that exhibits were missing. He also states (*id.* at 26) that by the end of trial it became apparent that four of the missing exhibits were critical to his defense. During the trial itself and at the sentencing hearing, however, petitioner's counsel represented to the court that he did not discover that exhibits were missing until the weekend following the first week of trial (C.A. App. 1511, 1647); he also stated at trial that the defense could "do without or replace" all but three of the missing exhibits (*id.* at 1509).

during the trial in order to reconstruct or locate the missing material, and made no apparent effort to locate copies of the exhibits within the files of co-defendants' attorneys. The court also found that petitioner had failed to make an adequate showing of materiality and prejudice.

The court of appeals agreed that petitioner waived his claim by failing to bring the matter of the lost exhibits to the district court's attention in a timely fashion (Pet. App. 11a-12a). The court of appeals noted that petitioner knew for some months before trial that some of the exhibits might be missing and that the exhibits were available for examination during this period. The court concluded that "counsel could reasonably have been expected to ascertain whether copies of the missing exhibits were actually extant prior to trial" (*id.* at 12a). While it declined to decide whether loss of the exhibits resulted in prejudice to petitioner, the court noted (*id.* at 11a) that petitioner's "proof of such prejudice was limited."

b. The court of appeals was correct in concluding (Pet. App. 6a-12a) that petitioner waived his claim based on loss of the exhibits because he failed to bring the matter to the attention of the trial court in a timely manner. Despite the letter from the court of appeals deputy clerk, petitioner's counsel failed to confirm the availability of all the exhibits until the trial was well underway. Once he discovered during trial that some of the exhibits were missing, petitioner's counsel delayed in bringing the matter to the trial court's attention until the close of the defense case. In addition, he failed to seek a continuance within which he could have attempted to obtain substitutes for the missing exhibits.

It may well be, as petitioner contends (Pet. 27-28), that earlier discovery and disclosure of the problem would not have helped to locate the missing exhibits. However, earlier notice of the unavailability of the exhibits would have allowed the parties to attempt to obtain reasonable substitutes. For example, the parties could have entered into stipulations concerning the contents of the exhibits, or transcripts of testimony at the first trial concerning the exhibits could have been read to the jury. One of the missing exhibits—an excerpt from a factoring house sales brochure (DX 36)—was largely duplicated by material in DX 20-C. That material could have been copied and introduced separately to highlight its significance. Petitioner could have attempted to secure copies of another exhibit, a letter from Sears, Roebuck to an officer of TVM (DX 5), from Sears itself. Petitioner's delay in raising the question of the missing exhibits prevented determination of whether the exhibits might have been available in another form.[4]

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[4] The cases petitioner cites (Pet. 29-32) do not conflict with the court of appeals' decision in this case. *United States* v. *Whimpy*, 531 F.2d 768, 772 (5th Cir. 1976), involved a defendant who entered a delayed objection to rebuttal testimony outside the jury's presence and moved for a mistrial at that time. The court of appeals recognized that an immediate objection would have accentuated the prejudicial impact of the testimony and that counsel had objected as soon as possible thereafter. The court also noted that the evidence was so prejudicial that no instruction could have cured the error and the only proper remedy was a mistrial; consequently, the timing of the mistrial motion was irrelevant. The other cases cited by petitioner all stand for the proposition that when an untimely motion to suppress is considered on the merits by the district court, it is appropriate for the court of appeals to

c. Even if petitioner had raised his claim concerning the missing exhibits in a timely manner, he could not prevail. The record does not support petitioner's contention that the four missing exhibits he cites were material and that their unavailability irreparably prejudiced his defense.

The defense exhibit to which petitioner attached the most importance—the videotape of three commercials (DX 35)—was the subject of a stipulation at the retrial; the jury was thereby made aware of both the existence and content of the exhibit. In view of the prosecutor's unrebutted observation at the first trial concerning the unprofessional quality of the commercials (see I Tr. 3617-3618), it is most unlikely that use of the stipulation, rather than the videotape itself, prejudiced petitioner.

A second exhibit—the letter from Sears, Roebuck to an officer of TVM (DX 5)—was read into the record at the first trial (I Tr. 921-923); the

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consider the merits of the district court's ruling. *United States* v. *Crosby*, 739 F.2d 1542, 1548 (11th Cir. 1984); *United States* v. *Contreras*, 667 F.2d 976, 978 n.2 (11th Cir.), cert. denied, 459 U.S. 849 (1982); *United States* v. *Marx*, 635 F.2d 436, 440-441 (5th Cir. 1981); *Taglavore* v. *United States*, 291 F.2d 262, 264-265 n.1 (9th Cir. 1961); *Wrightson* v. *United States*, 222 F.2d 556, 560-561 (D.C. Cir. 1955). While such rulings are probably erroneous under Fed. R. Crim. P. 12 in the absence of a finding of good cause for the procedural default, they involve a different question from that presented here. The cases cited in no way indicate that a court of appeals is required to rule on the merits of an untimely claim concerning missing exhibits, particularly in the circumstances of this case, in which the district court rejected the claim primarily on the ground that it was untimely. In any event, as we show in text, it is clear that loss of the exhibits did not interfere in any significant way with petitioner's ability to present his defense.

transcript of that testimony could have been used in the retrial. In addition, the government witnesses through whom the letter had been introduced testified at the retrial; however, petitioner's counsel did not ask them about the letter (C.A. App. 596-602, 1124-1126). Petitioner himself did testify about the substance of the letter at the retrial. In any event, the letter was of marginal importance to petitioner's defense, which rested on his claim that he was duped by the TVM scheme, not on whether Sears in fact did business with TVM. The conclusion that loss of the letter did not prejudice petitioner's defense is confirmed by the fact that petitioner's counsel at the first trial failed to include the letter in his enumeration of exhibits "that were a substantial part of and critical to the presentation of" petitioner's defense (*id.* at 173B).

A third exhibit—a Sears invoice and shipping receipt (DX 20)—also was introduced through testimony of a government witness at the first trial; a transcript of that testimony could have been used at the retrial. Moreover, another exhibit (DX 4) that was not lost between trials established the same connection between Sears and TVM. As we noted above, and as petitioner himself acknowledged at the post-trial hearing on the missing exhibits (C.A. App. 1602-1603, 1609-1610), the fourth exhibit he cites—a factoring house sales brochure (DX 36)—contained information that was introduced at the retrial as part of DX 20-C. See Pet. App. 10a n.*. In addition, petitioner testified about the brochure at the retrial (C.A. App. 1245-1246, 1254).

This Court has held that even in cases in which the government has taken affirmative steps that result in the loss of evidence, a defendant cannot establish

a constitutional violation unless he makes "some plausible showing of how [the evidence] would have been both material and favorable to his defense." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (footnote omitted). See also *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9; *Washington* v. *Texas*, 388 U.S. 14, 23 (1967); *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). Here the loss of the exhibits was inadvertent and was not the responsibility of the prosecution. The exhibits did not play a central role in petitioner's defense, as evidenced by petitioner's counsel's failure to discover that the exhibits were missing until several days into the trial, his failure to bring the matter to the attention of the trial court until after the defense had rested, and his inability to suggest which of the exhibits allegedly were crucial to the defense case until the jury began to deliberate. As we have shown, the unavailability of the four exhibits did not interfere significantly with petitioner's ability to present his defense at the retrial. Thus, petitioner has failed to make a showing that would support his claim to relief.

2. Petitioner next contends (Pet. 33-40) that the trial court abused its discretion in admitting evidence that he previously had encouraged one of his clients to invest in securities of Golden West Utilities, an unrelated business venture of co-conspirator Moss. The court of appeals correctly concluded that this evidence was properly admitted (Pet. App. 13a-15a).

Around the time Moss approached petitioner in connection with the TVM scheme, petitioner was aware that Golden West had defaulted on its obligations, that the Securities and Exchange Commission

had enjoined Moss from selling unregistered Golden West securities, and that the Arizona Strike Force on Organized Crime was investigating Golden West (C.A. App. 1381, 1384-1385, 1405-1407). The evidence of petitioner's prior involvement with Moss and Golden West was introduced to show petitioner's state of mind when Moss approached him with the TVM deal and to rebut petitioner's assertions of ignorance and good faith (*id.* at 359-361). Petitioner contends that the evidence should not have been admitted because he did not know that Golden West was a fraud at the time he urged it as an investment. But as the court of appeals held (Pet. App. 14a-15a), "[t]o justify admission it was not necessary that the government prove [petitioner's] actual knowledge that Golden West was fraudulent; had [petitioner] actually been serving his clients' interests in good faith as he claimed, he could have been expected to undertake a more diligent investigation of TVM where he knew that a client had suffered a substantial loss on a previous Moss investment scheme designed in a comparable fashion."

Petitioner's reliance on *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979), is misplaced. The court in *Beechum* considered "the admissibility of offenses extrinsic to a defendant's indictment to prove his criminal intent" (*id.* at 902). It held that when evidence of a prior crime is introduced for that reason there must be a common characteristic that is significant for the purpose of the inquiry (*id.* at 911). Where the government sought to show intent to commit the offense charged, the court concluded that there must be proof that the extrinsic offense required the same intent as the charged offense and proof that would

allow the jury to find that the defendant committed the extrinsic offense (*id.* at 913). Here the common characteristic is not petitioner's intent, but Moss's involvement in the two fraudulent schemes. The *Beechum* court's requirement of the same state of mind for both offenses is irrelevant to the question whether the Golden West venture should have put petitioner on notice of the need to exercise extra care in connection with the TVM venture. Moreover, since there was no suggestion of petitioner's culpable involvement in Moss's prior scheme, the danger that Fed. R. Evid. 404(b) addresses—the prejudicial imputation of bad character from prior misconduct—was not present.

3. Petitioner contends finally (Pet. 41-49) that his four-year term of imprisonment was unduly harsh in comparison to the eight-month term of imprisonment and $5,000 fine imposed on his co-defendant Halton Bittick, who pleaded guilty to one securities count prior to the second trial. The court of appeals correctly rejected this claim (Pet. App. 16a-17a).

The sentence imposed on petitioner was well within the statutory maximum for the multiple counts of mail fraud on which he was convicted. It is therefore presumptively a proper exercise of judicial discretion. See *United States* v. *Tucker*, 404 U.S. 443, 446-447 (1972). Moreover, the sentence to a four-year term of imprisonment (accompanied by a recommendation that petitioner be considered for release on parole after serving 20 months, see C.A. App. 178) was shorter than the five-year term of imprisonment to which petitioner had been sentenced after the first trial. On its face, there is nothing unfair or unreasonable about petitioner's sentence. See *United States* v. *Fields*, 689 F.2d 122, 128 (7th Cir.), cert. denied, 459 U.S. 1089 (1982).

Petitioner contends that the sole reason for the disparity between his sentence and Bittick's sentence was petitioner's decision to proceed with a retrial. Petitioner cites no evidence in support of his claim of vindictiveness. As the court of appeals noted, petitioner and Bittick were convicted on the same mail fraud counts at the first trial and received similar sentences. After the second trial, however, petitioner again had been convicted of multiple mail fraud counts, but Bittick faced sentencing on only a single securities charge. Pet. App. 16a-17a. That difference alone is sufficient to explain the discrepancy in sentences.

Moreover, the record shows that the district court based its sentencing decision on a number of specifically identified and appropriate factors. The court noted that, despite the contrary evidence at two trials, petitioner continued to maintain that he was only guilty of "giving bad investment advice" (C.A. App. 1641, 1681; see also *id.* at 297, 1638-1639). In addition, although the scheme had caused his clients to lose more than four million dollars, petitioner repaid only $40,000 in satisfaction of a settlement in a class action against him (*id.* at 1643). The court also referred to the deterrent effect of the sentence on potential wrongdoers and the public interest in seeing that frauds do not go unpunished (*id.* at 1642). The court further noted that Bittick had been convicted on only one count, while petitioner had been convicted on 12 counts (*id.* at 1656); in addition, Bittick refunded approximately $400,000 to the victims of the fraud (*ibid.*), and he agreed to cooperate with the government and was available to testify against petitioner at trial (*id.* at 1672). These considerations fully justify the district court's decision

to impose a substantial term of imprisonment on petitioner and a lesser sentence on Bittick. See *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); *United States* v. *Grayson*, 438 U.S. 41, 50 (1978); *Williams* v. *New York*, 337 U.S. 241, 248-249 n.13 (1949); *United States* v. *Barbara*, 683 F.2d 164, 167 (6th Cir. 1982); *United States* v. *Tracey*, 675 F.2d 433, 441 (1st Cir. 1982); *United States* v. *Bradford*, 645 F.2d 115 (2d Cir. 1981); *United States* v. *Miller*, 589 F.2d 1117, 1138-1139 (1st Cir. 1978), cert. denied, 440 U.S. 958 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
Attorney

APRIL 1985

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